P.R. No. 328/06
Presented by Shri Pawan Kothe
dated 06/2/06

(5)

IN THE HIGH COURT OF JUDICATURE AT BILASPUR (CHHATTISGARH)

Single Bench

Misc. Appeal No. 149 /2006

Appellant
Defendant

Ashok Kumar Sahu, aged about 30 years, S/o Radhelal Sahu R/o Budhwari para, Infront of Dr. Chouhan House, Dongargarh Distt. Rajnandgaon

Versus

Respondent
Plaintiff

Madhusudan aged about 37 years, S/o Durga Shanker Agrawal R/o Narsingh Ward, Infront of Guttani house, Dongargarh, Distt.Rajnandgaon.

APPEAL UNDER ORDER 43 RULE 1 (d) OF THE CODE OF CIVIL PROCEDURE

XI-HC-78

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A.F.R.

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

13.11.2006

Appellant-Ashok Kumar Sahu by Shri Parag Kotecha, Advocate.
Respondent-Madhusudan by Shri Amiyakant Tiwari, Advocate.

At the request of the parties, this Misc. Appeal is heard finally today.

This appeal is directed against an order dated 18.01.2006 passed by the 1st Additional District Judge, Rajnandgaon in Miscellaneous Judicial case No. 17 of 2004 whereby the application under Order 9 Rule 13 C.P.C. filed by the defendant/appellant-Ashok Kumar Sahu for setting aside the ex-parte judgment and decree dated 18.06.2004 against the appellant/defendant-Ashok Kumar Sahu for Rs.60,000/- was dismissed.

Brief facts are that on 15.01.2004, the suit was fixed for appearance of the defendant. The summons issued against the defendant/appellant was returned by the Process Server-Kewal Das with the report that on 21.12.2003 when he went to serve the notice and made enquiries about the defendant in Budhwari locality, the defendant was not present. He was informed that the defendant had gone out of village. Wife of the defendant was present at the house, who refused to take a copy of the notice, due to which, he made service by affixture of the notice on the main door of the house. Pursuant to such report given by the Process Server Kewal Das, the First Additional District Judge proceeded ex parte against the defendant and ultimately on 18.06.2004 i.e. after more than 5 months passed an ex parte judgment and decree for Rs.60,000/- against the

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश - 2-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

defendant along with interest at the rate of 6% payable by the defendant from the date of suit till recovery.

The defendant preferred an application under Order No.9 Rule 13 C.P.C. which was registered as Misc. Judicial case No.17/2004. He pleaded that the plaintiff had in collusion with the Process Server Kewal Das, got a false report of service by affixture sent on the summons of the defendant. It was pleaded that neither the defendant's wife refused to take notice nor did the Process Server affix the notice on the main door of the house of the defendant. It was also pleaded that the defendant came to know about the ex-parte judgment and decree for the first time on 27.09.2004 and preferred an application under Order 9 Rule 13 C.P.C. within limitation on 08.10.2004. The application was supported by affidavits of the defendant and his wife-Kuleshwari. The plaintiff-respondent denied the pleadings of the defendant in toto and prayed that the application was liable to be dismissed. The 1st Additional District Judge, Rajnandgaon conducted an enquiry and recorded the statement of Ashok Kumar D.W.1 and Kuleshwari D.W.2 as also the statement of Process Server-Kewal Das N.A.No.2.

Shri Parag Kotecha, learned counsel for the defendant/appellant argued that the testimony of Process Server Kewal Das clearly goes to show that he was acting in collusion with the plaintiff/respondent. There was material variance in the report of the Process Server which was attested by one witness Surendra and his testimony, which revealed in paragraph 3 that one Deepak was present at the time of service. Paragraph 2 of the testimony of the Process Server also

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -3-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

showed that he made no efforts to enquire about the whereabouts of the defendant or to ascertain the location of the house of the defendant. Lastly, it was submitted that paragraph 5 of the testimony of the Process Server left no room for any doubt that he was acting in collusion with the plaintiff-decree-holder and had given a false report of service by affixture. On these premises, it was urged that the impugned order dated 18.01.2006 was liable to be set aside and the ex-parte judgment and decree dated 18.06.2004 in Civil Suit No.44-B/2003 was also liable to be set aside. Reliance was placed on a decision rendered by this Court in *Kunjlal vs. Khorbehreen & others* **2005(2) C.G.L.J. 368.**

On the other hand, Shri Amiyakant Tiwari while placing reliance on *Tea Auction Ltd. v. Grade Hill Tea Industry & Anr.* **2006 (7) Supreme 279** opposed this Misc. Appeal only on the ground that the ex-parte judgment and decree may be set aside but subject to heavy costs.

Having considered the rival submissions, I have perused the record of Civil Suit No.44-B/2003 and also the record of Misc. Judicial Case No. 17/2004, the testimony of the Process Server Kewal Das and the summons of the defendant issued for 15.11.2004 and the report of service by affixture written by Process Server Kewal Das. The report of Process Server on the summons does not give any detail as to the person who identified the house of the defendant and his wife Kuleshwari and also does not reveal the name of the lady who refused service of notice. The report of Process Server also shows that it has been signed by a witness namely Surendra, who was not examined by

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश — ५—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

the plaintiff/respondent. Process Server Kewal Das, in his testimony in paragraph 3, stated that the name of the person who was present at the time of service by affixture was perhaps Deepak Kumar. Paragraph 4 of the testimony of the Process Server also shows that one neighbouring lady had identified the wife of the defendant. However, the name of that lady was not mentioned by the Process Server in his report as mandated by Order V Rule 18 C.P.C. In paragraph 5, the Process Server also deposed that he came with the plaintiff-decree-holder to the Court and had snacks with him in the hotel. He also admitted that he did not make any payment for the snacks.

Under Order V Rule 18, it is necessary for the Process Server to endorse on the summons not only the time when and the manner in which the summons were served but also the name and address of the person who identified the person served and witnessed the delivery or tender of summons. In the present case, the testimony of Process Server Kewal Das read with the endorsement on the summons clearly goes to show that the name and address of the person identifying the person to whom the notice was tendered was not stated. It also shows that Process Server Kewal Das was acting in collusion with the plaintiff at the time of reporting service by affixture.

Placing reliance on **Kunjlal** (supra), I am of the considered opinion that non-mention of the name and address of the person who identified the house and the person to whom the notice was tendered and refused amounts to non-service of summons on the defendant and provides a valid ground to the defendant for making an application for

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश -5-	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अन्तिम आदेश

setting aside ex-parte decree. Consequently, the order dated 18.1.2006 passed in Misc.Judicial Case No.17/2004 by the 1st Additional District Judge, Rajnandgaon is wholly contrary to law and the ex-parte judgment and decree dated 18.6.2004 passed in Civil Suit No. 44-B/2003 is liable to be set aside

So far as the contention of Shri Amiyakant Tiwari that heavy costs should be imposed on the defendant/appellant is concerned, it is liable to be rejected. The plaintiff acted in collusion with the Process Server Kewal Das and got a false report of service by affixture endorsed on the summons of the defendant. The defendant filed an application supported by an affidavit after coming to know about the judgment and decree within the prescribed period of limitation. Thus, the question of awarding costs on the appellant/defendant does not arise.

Consequently, M.A. is allowed. The order dated 18.01.2006 passed by the 1st Additional District Judge in M.J.C.No.17/2004 is set aside. The ex-parte judgment and decree passed in Civil Suit No.44-B/2003 vide judgment dated 18.06.2004 is also set aside. The parties are directed to appear before the first Additional District Judge, Rajnandgaon on 7th of December, 2006.

M.C.P.No.194 of 2006 for stay is accordingly disposed of.

Certified copy as per rules.

Sd/-
Dilip Raosaheb Deshmukh
Judge

P.T.O.